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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JERMAINE CORNELIUS CARTER, Defendant and Appellant.	E071716 (Super.Ct.No. FSB03821) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Jermaine Cornelius Carter, in pro. per., for Defendant and Appellant.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Jermaine Cornelius Carter appeals from an order denying his Penal Code[1] section 851.85 motion to seal records on acquittal of a person appearing to the court to be factually innocent. Based on our independent review of the record, we find no error and affirm the order.

II

FACTUAL AND PROCEDURAL BACKGROUND[2]

On February 27, 1994, defendant, Walter Reginald Beasley, James Charles Beasley (the Beasley brothers), and the first victim were arguing in an alley in Rialto. Gunfire erupted between defendant and the victim, and the victim was killed. The three left in one of the Beasley brothers' cars.

They drove to Ivan Ray Warren's house and then took off with him in his car. They drove to a store where two of the four entered, held up the clerk at gunpoint, had him open the cash drawer, then shot him in the head, killing him.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The summary of the factual background is taken from this court's unpublished opinion from defendant's prior appeal in case No. E015694. (*People v. Carter* (Jan. 14, 1997, E015694) [nonpub. opn.].) This unpublished opinion is part of the record on appeal in the current appeal.

Next, they traveled to the parking lot of a K-Mart store, where they robbed a man whose disabled car was parked there. They then drove to the parking lot of a nearby Coco's restaurant, where a woman and man were held up at gunpoint.

On August 25, 1994, an information was filed charging defendant with seven felony counts: one count of attempted murder (§§ 664/187, subd. (a); count 1) of Ronnie Finley; one count of murder (§ 187, subd. (a); count 2) of William Rice with a firearm enhancement (§ 12022.5, subd. (a)); one count of second degree robbery (§ 211; count 3) with a firearm enhancement (§ 12022.5, subd. (a)); one count of murder (§ 187, subd. (a); count 4) of Robert Khatib, Jr., with special allegations that the crime occurred (a) during the commission of a robbery (§ 190.2, subd. (a)(17), (b) for financial gain (§ 190.2, subd. (a)(1)), and (c) multiple murders (§ 190.2, subd. (a)(3)); and three counts of second degree robbery (§ 211; counts 5, 6, & 7).[3]

This matter went to trial by jury against both defendant and codefendant Warren. Upon conclusion of the evidence, both defendants made motions under section 1118.1 for dismissal of all charges against them. The trial court denied the motion in its entirety as to codefendant Warren, and granted defendant's motion only as to count 1, attempted murder. In granting defendant's section 1118.1 motion as to count 1, the trial court explained: "I think that if the prior inconsistent statement is the only evidence connecting the defendant with the crime it seems to me that the reasoning of all of these cases that

[3] The criminal complaint also named Walter Reginald Beasley, James Charles Beasley, and Ivan Ray Warren as defendants. Both Beasleys entered a plea before trial and codefendant Warren was tried with defendant.

I've just cited is the same. Especially *Marquez* [*People v. Marquez* (1993) 16 Cal.App.4th 115, 121], where it says that the court must on its own instruct the jury that it must be confirmed—or that it must be corroborated. And there's nothing here to corroborate it. [¶] So I—I think, I have to conclude that Mr. Porter [defendant's trial counsel] is correct that if the jury were to return a verdict of guilty with regard to the Finley shooting [count 1], that the court would have no option but to reverse that for insufficiency of the evidence. And if that's the case I think I'm required to grant the 1118 motion. As to Count 1."

Subsequently, the jury convicted defendant and codefendant Warren of four counts of second degree robbery (§ 211), during one of which defendant used a handgun (§ 12022.5, subd. (a)), and one count each of first degree murder (§ 187). As to both defendants, the jury further found the special circumstance that the murder occurred during a robbery (§ 190.2, subd. (a)(17)), and, as to defendant, the jury also found the special circumstance of multiple murder (§ 190.2, subd. (a)(3)). The jury also convicted defendant of second degree murder, during which he used a handgun. Both defendants received life terms without the possibility of parole, along with determinate terms.

Defendant appealed, making a variety of contentions, including: (1) error of the trial court in denying the defenses' motion to sever; (2) the admission of preliminary hearing transcripts; (3) jury instructions involving membership in a conspiracy; (4) failure of the trial court to instruct the jury with CALJIC Nos. 6.22 or 17.00; (5) absence of instructions on the timing of the defendants' intent and acts as aiders and

abettors; and (6) the trial court's failure to instruct the jury with CALJIC No. 9.44 on the duration of the robbery. This court rejected each of defendant's contentions and affirmed the judgment in an unpublished opinion filed on January 14, 1997.

On September 22, 2017, defendant filed a section 851.85 motion to seal records on acquittal if person appears to be factually innocent. Defendant argued that good cause existed to waive the time limit on filing his motion because his trial counsel was ineffective for failing to file a timely motion. Defendant also claimed that he was entitled to have the records sealed in his case based on a determination of factual innocence following the grant of his section 1118.1 motion for insufficiency of the evidence on count 1. Defendant explained that he was factually innocent because even though Walter Beasley originally told police that it was defendant who shot Finley, Walter Beasley testified that he had lied and he had been alone when he shot Finley. In addition, defendant asserted Finley testified that Beasley shot at him and he could not identify anyone else in the car. However, one of the detectives testified that during his interview of Finley, Finley stated that defendant was in the car at the time of the shooting.

On August 3, 2018, the People filed an opposition to defendant's motion to seal records and a request for judicial notice. The People argued that defendant did not qualify for relief under section 851.8 because he was convicted of the charges, despite the court granting defendant's section 1118.1 motion as to count 1. Furthermore, the People asserted that when count 1 was dismissed due to insufficient evidence, the trial court had not made a finding of factual innocence of the crime of attempted murder.

On October 19, 2018, defendant filed a response to the People's opposition to his motion to seal records. Defendant reiterated that Finley testified he only guessed defendant was in the car, it was Beasley who shot him, and that was all he actually saw. In addition, defendant claimed that Beasley had admitted or confessed he was alone in the car and shot Finley.

A hearing on defendant's motion to seal records was held on October 19, 2018. At that time, the parties submitted on the moving papers. The court denied defendant's motion, finding that while count 1 was dismissed for insufficient evidence under section 1118.1, the trial court had not made a finding of factual innocence at that time. The court stated that a dismissal on grounds of insufficient evidence is not the same as factual innocence. The court noted that count 1 had been dismissed because the inconsistent statements of a witness were not sufficient standing alone to prove guilt beyond a reasonable doubt. The court explained that under section 851.8 "the defendant would not be entitled to have his record sealed because a charge was dismissed pursuant to Penal Code Section 1118.1, or even if a jury returned a verdict of not guilty, that's still not a declaration of factual innocence that would entitle the defendant to have his record sealed." The court further ruled that "where there are multiple counts, . . . the defendant is convicted of some of the counts, that even if there was a finding of factual innocence as to some of the other counts, the defendant is not entitled to have his record sealed because there still is a conviction on some of the counts."

On November 20, 2018, defendant filed a timely notice of appeal.

III

DISCUSSION

After defendant appealed, upon his request, this court appointed counsel to represent him on appeal. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and requesting this court to conduct an independent review of the record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. In his three-page letter brief, defendant asserts that the trial court should have granted his section 851.85 motion because he should have been found factually innocent based on the testimony of Finley and Beasley, who had testified in a manner that exonerated him.

Under section 851.8, a factually innocent person may petition the court to have his or her arrest records sealed and destroyed. (§ 851.8, subd. (b).) When a court makes a finding of "factual innocence" it means that "no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." (*Ibid*.) There are three classes of persons who may petition the court for a finding of factual innocence. (§ 851.8, subds. (a), (c), (d), & (e).) "Those classes are (1) persons who have been arrested but no accusatory pleading has yet been filed[, subdivision (a)]; (2) persons who have been arrested and an accusatory pleading has been filed but no conviction has occurred[, subdivisions (c), (d)]; and (3) persons who are 'acquitted of a charge and it

appears to the judge presiding at trial . . . that the defendant was factually innocent'[, subdivision (e)]." (*Tennison v. California Victim Comp. & Government Claims Bd.* (2007) 152 Cal.App.4th 1164, 1171, fn. 4.)

"'"'"Reasonable cause"'" is a well-established legal standard, '"defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime."'" (*People v. Adair* (2003) 29 Cal.4th 895, 904 (*Adair*).) Thus, to be entitled to relief under the reasonable cause standard articulated in section 851.8, a petitioner "must establish that facts exist which would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the person arrested is guilty of the crimes charged." (*People v. Matthews* (1992) 7 Cal.App.4th 1052, 1056 (*Matthews*); see *Adair*, at p. 904.) "To meet this burden, the petitioner must show more than a viable defense to the crime. He . . . must establish '"that there was no reasonable cause to arrest him in the first place."'" (*People v. Medlin* (2009) 178 Cal.App.4th 1092, 1102.) Petitioners must "'show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action . . . .'" (*Adair*, at p. 909.) "In sum, the record must exonerate, not merely raise a substantial question as to guilt." (*Ibid*.) Section 851.8 therefore "precludes a finding of factual innocence if *any* reasonable cause exists to believe the [petitioner] committed the charged offense." (*Adair*, at p. 907.)

A petitioner's burden to establish factual innocence has been described as "'incredibly high'" and as requiring "'no doubt whatsoever.'" (*People v. Esmaili* (2013) 213 Cal.App.4th 1449, 1459 (*Esmaili*).) "'Section 851.8 is *for the benefit of those defendants who have not committed a crime*.'" (*Adair, supra*, 29 Cal.4th at p. 905, italics added.) A court cannot order the partial sealing and destruction of a factually innocent petitioner's arrest records. Section 851.8 does not provide "for the surgical excision of only certain portions of an arrest record." (*Matthews, supra*, 7 Cal.App.4th at p. 1063.) "We would defeat the statutory purpose of leaving a factually innocent person with an unblemished record and run afoul of the legislative objective sought to be achieved were we to permit the sealing and destruction of only part of an accused's arrest record." (*Ibid.*)

When reviewing a trial court's ruling on a section 851.8 petition, an appellate court "must apply an independent standard of review and consider the record de novo in deciding whether it supports the trial court's ruling." (*Adair, supra*, 29 Cal.4th at p. 905.) "[A]lthough the appellate court should defer to the trial court's factual findings to the extent they are supported by substantial evidence, it must independently examine the record to determine whether the [petitioner] has established 'that no reasonable cause exists to believe' he or she committed the offense charged." (*Id.* at p. 897.)

Applying the independent review standard, we conclude defendant has not met his burden in establishing factual innocence as to count 1, attempted murder. Although the court granted defendant's section 1118.1 motion as to count 1 based on insufficient evidence, defendant was convicted of the remaining six felony counts. The record fails to disclose that the trial court granted defendant's section 1118.1 motion because defendant was factually innocent of count 1. Clearly, there was probable cause to arrest defendant on count 1 based on statements made by Walter Beasley, Finley (the victim), and the detective. Walter Beasley had originally informed the police that it was defendant who shot Finley. The fact Walter Beasley later recanted made the prosecution's case weak as to count 1 and undoubtedly caused the trial court to grant defendant's section 1118.1 motion as to count 1. We cannot say, however, there is not reasonable cause to believe defendant committed the offense. If a jury had heard the evidence and believed Walter Beasley's original version and the detective's statements that defendant was in the car at the time Finley was shot, there would have been sufficient evidence to convict. (*Adair*, *supra*, 29 Cal.4th at p. 909.) Sufficient evidence to establish probable cause will generally preclude a finding of factual innocence. (*People v. McCann* (2006) 141 Cal.App.4th 347, 358.)

Even if a trier of fact ultimately determines that conflicting evidence evinces greater credibility than the evidence supporting probable cause, a finding of factual innocence cannot be sustained. (See, e.g., *Esmaili*, *supra*, 213 Cal.App.4th at pp. 1455-1456, 1458 [upholding a determination of no factual innocence despite magistrate's

failure to hold defendant to answer in a child sexual abuse case because of questionable credibility of child victim]; see also *People v. Bleich* (2009) 178 Cal.App.4th 292, 303 [upholding a determination of no factual innocence despite magistrate's failure to bind over because of weakness of evidence of identity of perpetrator of terrorist threats].)

Moreover, defendant was charged with multiple offenses and enhancement allegations to which a jury found him guilty as charged. We cannot order the partial sealing and destruction of a factually innocent petitioner's arrest records. As previously explained, section 851.8 does not provide "for the surgical excision of only certain portions of an arrest record." (*Matthews*, *supra*, 7 Cal.App.4th at p. 1063.)

Accordingly, we find the trial court correctly denied defendant's section 851.85 motion to seal records based on the requirements under section 851.8.

An appellate court conducts a review of the entire record to determine whether the record reveals any issues which, if resolved favorably to defendant, would result in reversal or modification of the judgment. (*People v. Wende*, *supra*, 25 Cal.3d at pp. 441-442; *People v. Feggans* (1967) 67 Cal.2d 444, 447-448; *Anders v. California*, *supra*, 386 U.S. at p. 744; see *People v. Johnson* (1981) 123 Cal.App.3d 106, 109-112.)

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the entire record for potential error and find no arguable error that would result in a disposition more favorable to defendant.

IV

DISPOSITION

The order denying defendant's section 851.85 motion to seal records is affirmed.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MENETREZ
J.